**STATE OF CALIFORNIA**
**OFFICE OF ADMINISTRATIVE LAW**

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| **In re:** | ) | **NOTICE AND DECISION RE APPROVAL AND PARTIAL DISAPPROVAL OF A RULEMAKING ACTION** |
| **AGENCY: State Water Resources Control Board** | ) | **(Gov. Code Sec. 11353)** |
| **RULEMAKING ACTION: Adoption of the Policy for the Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California. Summarized at Section 2914 of Title 23 of the California Code of Regulations** | ) | **OAL File No. 00-0317-15** |

## SUMMARY OF RULEMAKING ACTION

This policy, adopted by State Water Resources Control Board Resolution Nos. 2000-015 and 2000-030, establishes implementation provisions for the priority pollutant criteria promulgated by the U.S. Environmental Protection Agency in the California Toxics Rule and in the National Toxics Rule, and for priority pollutant objectives established by California Regional Water Quality Control Boards in the various basin plans. The policy also establishes monitoring requirements for 2,3,7,8-TCDD equivalents (dioxin-like compounds); chronic toxicity control provisions, procedures for initiating site-specific objective development, and exception provisions. In addition, the policy describes the State's existing nonpoint source management approach. The policy becomes effective upon approval by the California Office of Administrative Law (OAL) both for the priority pollutant criteria in the National Toxics Rule which are applicable in California and for the priority pollutant water quality objectives in the various California Regional Water Quality Control Board basin plans. For the priority pollutant criteria in the California Toxics Rule, the policy becomes effective once it is approved by OAL and the California Toxics rule becomes effective.

## DECISION

OAL hereby approves the "Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (the Policy) with the exception of the

provisions listed below, six of which are severed and disapproved for failing to satisfy the Clarity standard of Government Code Section 11349.1 and the last of which is severed and disapproved as a prospective incorporation by reference:

1. The provision in Section 1.4 of the Policy which provides: "Effluent limitations in NPDES permits shall be expressed in terms of either concentration or mass in accordance with State or federal law."

2. The provision in Section 2.1 of the Policy which provides: "RWQCBs shall consider the SWRCB's intent to reassess and modify, as appropriate, water quality standards for water bodies that may depend on the discharge of wastewater to support its beneficial uses in establishing compliance schedules for dischargers."

3. The provision in Section 3 of the Policy that authorizes RWQCBs to require "non-NPDES dischargers as appropriate" to monitor for 2,3,7,8-TCDD congeners (dioxin).

4. The provision in Section 3 of the Policy which provides: "The RWQCBs have discretion, on a case-by-case basis, to require storm water dischargers to monitor the cogeners at the locations and frequencies specified by the RWQCBs."

5. The provision in Section 4 of the Policy (Toxicity Control Provisions) which provides: "If persistent or repeated toxicity is identified in ambient waters, and it appears to be due to nonpoint source discharges, the appropriate nonpoint source dischargers, in coordination with the RWQCB, shall perform a TRE. Once the source of toxicity is identified, the discharger shall take all reasonable steps to eliminate toxicity."

6. Footnote 15 in Section 5.2 of the Policy which provides: "A storm water permittee or discharger regulated under a non-NPDES WDR may also request a site-specific study pursuant to this section."

7. The provision in Section 2.3 of the Policy on the analytical methods that may be required for monitoring which provides: "or alternative test procedures that have been approved by the U.S. EPA Regional Administrator pursuant to 40 CFR 136.4 and 40 CFR 136.5 (revised as of May 14, 1999).

A detailed explanation of the reasons for the disapproval of these seven provisions is set out below. The remainder of the Policy is approved because the requirements of Government Code Section 11353, including summary and response to comments as required by the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 *et seq.*, and the standards set forth in Government Code Section 11349.1 have been satisfied.

## DISCUSSION

The State Water Resources Control Board (State Board) must submit any state policy for water quality control that it adopts or revises after June 1, 1992, to the Office of Administrative Law (OAL) for review. The submittal must include a clear and concise summary of each regulatory

provision adopted or approved as part of the action, the complete administrative record of the proceeding, a summary of the necessity for each regulation, and a certification by the chief legal officer of the State Board that the procedural requirements of Division 7 (commencing with Section 13000) of the Water Code have been satisfied. Pursuant to Government Code Section 11353, OAL reviews the adopted or approved regulatory provisions for compliance with the Administrative Procedure Act standards of Authority, Reference, Consistency, Clarity, Nonduplication and Necessity, as defined by Government Code Section 11349. OAL also reviews the responses to public comments to determine compliance with the public participation requirements of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 *et seq.*) OAL must restrict its review to the regulatory provisions in the policy and the administrative record of the proceeding. In conducting this review OAL is mindful that it is not to substitute its judgment for that of the State Board with regard to substantive content of the regulatory provisions. This review serves as an executive branch check on the exercise of quasi-legislative powers by the State Board.

**A.**

Each regulatory provision in a state policy for water quality control must satisfy the Clarity Standard of Government Code Section 11349.1. "'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." Government Code Section 11349, subsection (c). The following provisions do not satisfy this requirement.

**1.** Section 1.4 of the Policy specifies methods that may be used by a Regional Board to establish effluent limits to control a priority pollutant in a discharge and provides in part: "Effluent limitations in NPDES permits shall be expressed in terms of either concentration or mass in accordance with State or federal law."

The requirement to express effluent limits in permits "in terms of either concentration or mass in accordance with State or federal law" cannot be easily understood by those who are directly affected by it.

We consider applicable State and federal law. Permits must comply with federal regulations. Water Code Section 13377. Under applicable regulations effluent limits must be expressed in terms of mass, and may also be expressed in terms of concentration. 40 C.F.R. 122.45(f)(1) provides: "[a]ll pollutants limited in permits shall have limitations, standards. or prohibitions expressed in terms of mass" with certain exceptions. C.F.R. 122.45(f)(1) provides: "Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations." In addition, 40 C.F.R. 122.44(d) requires water quality-based effluent limitations expressed in terms of concentration when the discharge of a pollutant will cause or contribute to a water quality standard violation. Thus, the need for concentration-based limits must be determined on a case-by-case basis. In some cases both may be required. In light of these requirements, the requirement to express limits "in terms of either concentration or mass" (but not both) is confusing and cannot be easily understood.

The administrative record shows that this provision was crafted by the State Board, as a substitute for a provision that required limits to be expressed in terms of both concentration and mass, immediately before it adopted the Policy on March 2, 2000. Administrative record, pp. 8866-8880. (From its initial proposal in 1997 until the day it was adopted the Policy contained a provision requiring effluent limits to be expressed in terms of both concentration and mass.) Consequently the requirement to express effluent limits "in terms of either concentration or mass in accordance with State or federal law" was adopted by the State Board without ever having been addressed in the Functional Equivalent Document and without the benefit of public comment.

The administrative record also shows that the apparent reason the State Board adopted the either/or provision was to prevent problems when a discharger engaged in water conservation efforts. As a board member stated: In a water conservation effort "the total mass goes down, which is good, but the concentration goes up. So we don't want to do something here that would discourage those types of conservation efforts within water use." Administrative record, p. 8868. After considerable discussion, including several suggested revisions, the transcript of the board meeting indicates that the board chose not to delete the provision, and thus rely on what is required by applicable law (Administrative record pp. 8874-8877); instead, the board adopted the either/or provision. Notably, at the end of the discussion one board member abstained from voting on the provision stating: "I can't vote for it at this point not knowing what that means." Administrative record, p. 8880.

Consequently, because it is not easy for those who are directly affected by this provision to easily understand whether or how the state board intended to limit the discretion a permit writer otherwise has under applicable State or federal law in expressing the terms of an effluent limit, the either/or provision fails to satisfy the Clarity standard as required by Government Code Section 11349.1.

**2.** Section 2.1 of the Policy authorizes a Regional Board to establish a compliance schedule in an existing discharger's National Pollutant Discharge Elimination System (NPDES) permit if the discharger demonstrates that it is infeasible to achieve immediate compliance with a priority pollutant criterion or an effluent limitation based on a priority pollutant criterion in the California Toxics Rule or the National Toxics Rule. The section provides that the compliance schedule shall be as short as practicable, but in no case shall exceed five years from the date of permit issuance, reissuance, or modification.

At the adoption hearing on March 2, 2000, the State Board inserted the following provision into the part of Section 2.1 which sets the maximum time for a compliance schedule at five years: "RWQCBs shall consider the SWRCB's intent to reassess and modify, as appropriate, water quality standards for water bodies that may depend on the discharge of wastewater to support its beneficial uses in establishing compliance schedules for dischargers." This provision was not addressed in the Functional Equivalent Document for the policy. The public was not provided with an opportunity to comment on it.

The provision apparently refers to intent with regard to an action that the State Board may (or may not) take in the future. It is not possible to know with any degree of certainty what impact

the consideration of this "intent" is supposed to have on the setting of maximum compliance times by a Regional Board now. Consequently, this provision cannot be easily understood by those who are directly affected by it.

**3.** Section 3 of the Policy requires a Regional Board to require dischargers in its region to monitor discharged effluent for 17 cogeners of 2,3,7,8-TCDD (dioxins and furans containing chlorine at the 2,3,7, and 8 positions). The section purports, in part, to authorize a Regional Board to require "non-NPDES dischargers as appropriate" to monitor for the 2,3,7,8-TCDD congeners. The inclusion of non-NPDES dischargers in this part of the policy is confusing in light of the State Board's clearly stated intent in the introduction to the policy (which is consistent with the Board's intent as reflected in the minutes of the March 2, 2000, adoption hearing) that: "With respect to non-point source discharges, only section 5.1 [of the policy] applies." Consequently, the reference to non-NPDES dischargers in Section 3 of the policy is severed and disapproved.

**4.** Section 3 of the Policy (described in item 3, above) also provides: "The RWQCBs have discretion, on a case-by-case basis, to require storm water dischargers to monitor the cogeners at the locations and frequencies specified by the RWQCBs." The inclusion of storm water dischargers in this part of the policy is confusing in light of the State Board's clearly stated intent in the introduction to the policy (which is consistent with the Board's intent as reflected in the minutes of the March 2, 2000, adoption hearing) that: "This policy does not apply to regulation of storm water discharges." Footnote 1. Consequently, the provision regarding storm water dischargers in Section 3 of the policy is severed and disapproved.

**5.** Section 4 of the Policy establishes minimum toxicity control requirements for implementing the narrative toxicity objectives for aquatic life protection in the various Regional Water Quality Control basin plans. The section includes a provision which provides:

> If persistent or repeated toxicity is identified in ambient waters, and it appears to be due to nonpoint source discharges, the appropriate nonpoint source dischargers, in coordination with the RWQCB, shall perform a TRE. Once the source of toxicity is identified, the discharger shall take all reasonable steps to eliminate toxicity.

The inclusion of a provision applicable to nonpoint source discharges in Section 4 of the policy is confusing in light of the State Board's clearly stated intent in the introduction to the policy (which is consistent with the Board's intent as reflected in the minutes of the March 2, 2000, adoption hearing) that: "With respect to non-point source discharges, only section 5.1 [of the policy] applies." Consequently, the reference to non-NPDES dischargers in Section 4 of the policy is severed and disapproved.

**6.** Section 5.2 of the Policy provides that a Regional Board may develop site specific water quality objectives and specifies the procedures and criteria for doing so. Footnote 15 in Section 5.2 states that the section applies to storm water discharges and discharges regulated under a non-NPDES waste discharge requirements as follows:

> A storm water permittee or discharger regulated under a non-NPDES WDR may also request a site-specific study pursuant to this section.

This provision is confusing in light of State Board's clearly stated intent in the introduction to the policy (which is consistent with the Board's intent as reflected in the minutes of the March 2, 2000, adoption hearing) that "With respect to non-point source discharges, only section 5.1 [of the policy] applies." and that "This policy does not apply to regulation of storm water discharges." Consequently, the provision on storm water discharges and discharges regulated under a non-NPDES waste discharge requirements in Section 5.2 of the policy is severed and disapproved.

**B.**

Pursuant to Section 2.3 of the Policy, a Regional Board must specify analytical methods a discharger must use to evaluate compliance with effluent limits for priority pollutants in permits. The section authorizes the use of certain analytical methods set out in a specified federal regulation, analytical methods approved by the State Board or a Regional Board (under certain circumstances), "or alternative test procedures that have been approved by the U.S. EPA Regional Administrator pursuant to 40 CFR 136.4 and 40 CFR 136.5 (revised as of May 14, 1999)." The last alternative ("alternative test procedures that have been approved by the U.S. EPA Regional Administrator ...") has the effect of delegating to the U.S. EPA Regional Administrator the power to approve test procedures for use by a Regional Board.

The State Board does not have the authority to delegate this power to the U.S. EPA Regional Administrator. Consequently this provision fails to satisfy the Authority standard of Government Code Section 11349.1. "'Authority' means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." Government Code Section 11349.

This provision operates, in essence, as a prospective incorporation-by-reference of certain test procedures approved at some point in the future by the U.S. EPA Regional Administrator by making such procedures a part of the Policy. (An incorporation-by-reference of an external document into a State Board policy makes the incorporated text a part of the policy, as though the incorporated text were printed in its entirety as part of the policy.)

A prospective incorporation-by-reference (one that automatically incorporates test procedures approved in the future) is of dubious validity. While prospective incorporation-by-reference could cut down on periodic rulemaking by the State Board to incorporate test procedures approved in the future, it eliminates the opportunity for public participation in the decision to give regulatory effect to those test procedures. This problem has been described as follows:

> Prospective incorporation entirely removes from the usual rule-making process individual consideration, by the public and the agency, of each future change to the matter incorporated by reference, thereby effectively denying the many benefits of that process to those who may object to the legality or merits of the new amendments or editions. This is not an inconsiderable loss. It is equivalent to a

> declaration by the agency that it will not hold rule-making proceedings of any kind on the specific contents of each of those future amendments to or editions of the matter incorporated by reference, even though such changes will become effective law of the agency, and even if many of them turn out to be very controversial and of doubtful legality. Furthermore, it should be obvious that no one could effectively object to such later changes at the time the initial rule was adopted prospectively incorporating them by reference; at the time of the original rule-making proceeding in which the wholesale incorporation by reference of future changes was adopted, the specific content of those future changes would be unknown and unknowable.
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> In addition, allowing agencies to incorporate by reference, as rules, future amendments to or editions of the matter already incorporated in their rules involves an inappropriate delegation of power by the state legislature and the agencies involved to the body subsequently altering the incorporated matter. That is, in addition to being deprived of the benefits of the rule-making process for such future amendments or editions, the state legislature and the agencies issuing the rules containing the incorporated matter lose control over the content of the law involved. It is true, of course, that they can disapprove after the fact any specific amendment to or edition of the matter prospectively incorporated by reference. But it should be stressed that such action may be taken only after that new matter has become law. This is also why, in many states, prospective adoption of future amendments to or editions of the materials incorporated in rules by reference would be an unconstitutional delegation of authority to the body initially making those new amendments or editions, or would at least present serious questions of that nature. [Footnote omitted. Bonfield, State Administrative Rule Making (1986) pp. 325-326.]

Further, the validity of a prospective incorporation-by-reference has been questioned by the Court of Appeal on the basis of lack of opportunity for public participation in a case involving a Department of Health Care Services regulation incorporating-by-reference standards issued by the Department of Finance:

> There is no procedural barrier prohibiting the enacting agency from adopting by reference a set of standards issued by another agency if supporting evidence is made available at a public hearing, opportunity for refutation is given, the pro and con evidence considered and the evidentiary material assembled in an identifiable record. On the other hand, an attempt to embody by reference future modifications of the incorporated material without additional hearings would have dubious validity. (See Olive Proration etc. Com. v. Agric. etc. Com., ... , 17 Cal.2d at p. 209, 109 P.2d 918.) [*California Ass'n of Nursing Homes, Etc. v. Williams* (1970) 4 Cal.App.3d 800, 814, 84 Cal.Rptr. 590.]

Also, Section 20(c)(4) of Title 1 of the California Code of Regulations requires regulation text to identify a document that it incorporates by reference by "title and date of publication or issuance," unless "an authorizing California statute or other applicable law requires the adoption or

enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, . . ." The State Board has not identified such an authorizing statute.

For these reasons, OAL severed and disapproved the provision that authorizes a Regional Board to require a discharger to use a test procedure that has been approved by the U.S. EPA Regional Administrator pursuant to 40 CFR 136.4 and 40 CFR 136.5 (revised as of May 14, 1999).

**FOR THESE REASONS** OAL disapproved the severed parts of the Policy that are describe above.

Date: April 28, 2000

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